waged the war, does not have the constitutional authority to do what it has done. This criticism, which has come from many segments of society including federal legislators, has cast further doubt upon the legitimacy of our efforts in Indo-China and will cast doubt on the validity of any future military efforts. There is thus a deep need for a final and authoritative decision on the question of whether the Executive has the constitutional power to wage a major war without explicit Congressional authorization.

For a final and authoritative resolution of whether a particular branch of government possesses given powers under the Constitution, this nation, and the nonjudicial branches of government, look to the courts and ultimately to the Supreme Court. Ever since Marbury v. Madison, 1 Cranch 137 (1803), it has been the Supreme Court's bound duty to rule on whether branches of government are acting within their powers or outside of them. In Marbury,

where the Court ruled on whether Congress had the constitutional power to grant the Supreme Court original jurisdiction in the case at bar, the Court said, 1 Cranch at 177 - 178:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> *So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law; disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . .

Marbury's doctrine that it "is of the very essence of judicial duty" for courts to apply the constitution has been followed from 1803 to the present day in cases where the question was whether a branch of government had the constitutional power to take given actions. In the Prize Cases, 2 Black 635

(1863), this Court ruled on whether or not the President had the constitutional authority to institute a blockade during the Civil War. In Ex Parte Milligan, 4 Wall 2 (1866), the Court ruled on whether the Executive could try civilians by court martial during the Civil War. In Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court ruled on whether Congress and the President had the constitutional power to provide for the exclusion of Japanese-Americans from the west coast. In Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court passed on whether the President had the constitutional authority to seize the steel mills during the Korean war. In Powell v. McCormick, 395 U.S. 486 (1969), the Court passed on whether the Congress has the constitutional power to refuse to seat a Representative on grounds other than the Constitution's three requirements of age, citizenship and residency.

In the present case, this Court is being asked to perform the same bound judicial duty of applying the Constitution which it has performed ever since Marbury v. Madison. It is true that events of great magnitude, with possible effects on foreign relations, could be affected by a constitutional decision here. But the fact that events of consequence are involved is no constitutional warrant for the Court refusing to perform its judicial duty. This Court has performed its duty in many cases involving great events, events which at times had tremendous potential effects on foreign relations. The cases cited above, which involved questions of the constitutional power of Congress and the President, provide examples of this. Marbury v. Madison itself was heavily involved with the desperate struggle for power between two parties, the Jeffersonian Republicans and the Federalists, which had diametrically opposed ideas on how the country should be governed and what its

foreign policy should be. To rule on the legality of President Lindoln's blocade during the Civil War was obviously to pass legal judgment on events having the most enormous significance in relation to war and foreign relations. The ruling in Ex Parte Milligan was on a program that was claimed to be highly conducive if not absolutely necessary to the success of the union armies. Korematsu involved a geographical exclusion and internment program which was similarly claimed to be vitally necessary to our success in World War II. In Youngstown the government's position was that the President's seizure of the mills was essential to the successful continuation of the American war effort.

There have also been many other cases, involving events of great magnitude, in which the Court has performed its judicial duty. In McCulloch v. Maryland, 17 U.S. 316 (1819), the Court adjudicated the legality of the Bank of the United States, an institution

whose existence was the source of a furious and continuous public battle and had a critical impact on the economy. The first income tax, a subject of bitter public division, was adjucated in Pollock v. Farmer's Loan & Trust Co., 197 U.S. 429 (1895). Although the problem of race has been the most bitter and intractable question in American history, this Court dealt with racial segregation in Brown v. Board of Education, 347 U.S. 483 (1952). In Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); and other apportionment cases, the Court adjucated legal issues which involved the basic distribution of political power in the United States.

Thus, amicus reiterates that this Court's duty to interpret and apply the Constitution cannot be shirked because important events are involved. Nor can the Court's duty be avoided because the case comes to the Court on certiorari rather than on appeal as of right. One of the critical reasons for the

certiorari power is to enable the Court to select cases presenting questions of national importance for a full hearing, and this consideration is specifically recognized in the Court's own rules. Rule 19 (1)(b). The present case involves questions of paramount national importance. Moreover, in the last decades, many of the Court's most significant rulings have been delivered in cases which came up via certiorari. E.g., Youngstown Sheet & Tube v. Sawyer, supra; Bolling v. Sharpe, 347 U.S. 497 (1954); New York Times Co. v. United States, 29 L. Ed. 2d 822 (1971).

In conclusion, then, amicus believes that, in accordance with its constitutional role as layed out in Marbury v. Madison and continued to the present day, this Court has a duty to resolve the paramount constitutional issues presented here. Amicus therefore urges the Court to grant certiorari and decide the case so that the legislature and the nation may

know with finality whether the Executive has the legal power to fight a major war that has not been explicitly authorized by Congress.

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